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In the
Supreme Court of the United States

MAHER ARAR,

Petitioner,

v.

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RETIRED FEDERAL JUDGES AS AMICI CURIAE SUPPORTING PETITIONER*

***See inside cover for list of Amici**

ELIZABETH GOITEIN
EMILY BERMAN
THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, NY 10013
(212) 998-6730

AZIZ Z. HUQ
1111 East 60th St.
Chicago, IL 60637
(773) 702-9566

SIDNEY S. ROSDEITCHER
Counsel of Record
AARON S. DELANEY
BRIAN A KOHN
ERIC S. TAM
PAUL, WEISS, RIFKIND WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

Counsel for Amici Curiae

LIST OF AMICI

The Honorable John J. Gibbons

The Honorable Shirley M. Hufstedler

The Honorable Nathaniel R. Jones

The Honorable Timothy K. Lewis

The Honorable H. Lee Sarokin

The Honorable William S. Sessions

The Honorable Patricia M. Wald

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INTEREST OF AMICI[1]

Amici are retired federal judges who share a deep respect for the system of separation of powers and checks and balances that is central to our constitutional democracy. Based on their combined decades of experience on the federal bench, Amici have a particular interest in the preservation of the historic role of the judiciary in that constitutional system as the protector of rights guaranteed by the Constitution.

The Honorable John J. Gibbons served as a judge on the U.S. Court of Appeals for the Third Circuit from 1969 to 1987, and as chief judge of the court from 1987 to 1990.

The Honorable Shirley M. Hufstedler served as a judge on the United States Court of Appeals for the Ninth Circuit from 1968 to 1979.

The Honorable Nathaniel R. Jones served as a judge on the United States Court of Appeals for the Sixth Circuit from 1979 to 2002.

The Honorable Timothy K. Lewis served as a judge on the United States District Court for the

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[1] Pursuant to Supreme Court Rule 37.2(a), Amici certify that counsel of record of all parties received timely notice of the intent to file this brief in accordance with this Rule and they have consented to the filing of this brief. Letters of consent by counsel of record for the parties have been lodged with the Clerk of this Court. Pursuant to Rule 37.6, Amici certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than Amici or their counsel, has made a monetary contribution to its preparation or submission.

Western District of Pennsylvania from 1991 to 1992, and as a judge on the United States Court of Appeals for the Third Circuit from 1992 to 1999.

The Honorable H. Lee Sarokin served as a judge on the United States District Court for the District of New Jersey from 1979 to 1994, and as a judge on the United States Court of Appeals for the Third Circuit from 1994 to 1996.

The Honorable William S. Sessions served as a judge on the United States District Court for the Western District of Texas from 1974 to 1980, and as chief judge of the court from 1980 to 1987.

The Honorable Patricia M. Wald served as a judge on the United States Court of Appeals for the District of Columbia Circuit from 1979 to 1999, and as chief judge of the court from 1986 to 1991.

SUMMARY OF ARGUMENT

Amici submit this brief in support of the Petition of Maher Arar to address those reasons why it is especially important, from our perspective as former federal judges, that this Court grant certiorari to review the Second Circuit's rejection of Arar's claim for damages under the doctrine of *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). We submit that the Second Circuit's decision establishes precedent in that circuit that undermines the role of the federal judiciary in our constitutional system, and could influence other federal courts to do the same.

Petitioner's allegations, which at this stage must be accepted as true, describe the most egregious

violations of his constitutional rights: a conspiracy by federal officials to transfer him to Syria to be interrogated through the use of torture, implemented by those officials through stealth and deception that deprived Arar of the opportunity to seek judicial review to prevent that transfer. The Second Circuit justified its rejection of Arar's claim for damages under the *Bivens* doctrine on the ground that considerations of national security and foreign policy were "special factors" counseling against a damages remedy. The Second Circuit refused to even consider the fact that denying Arar a *Bivens* remedy would leave him entirely without a remedy for the most flagrant violations of his constitutional rights, holding that the court should not exercise its remedial powers absent an express grant of authority from Congress.[2]

Amici submit that certiorari to review the decision below is warranted for three reasons. First, this Court should reaffirm that the Constitution assigns to the judiciary the paramount role as a check against unconstitutional government conduct and that in this role, the judiciary has both the authority and the obligation to craft appropriate remedies for constitutional violations carried out by federal officials. This is especially so when its failure to do so will leave violations of constitutional rights unredressed. The Second Circuit's assertion that it should be left to Congress to decide whether to provide a remedy for violations of individual constitutional rights is

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[2] Before addressing the *Bivens* issue, the Second Circuit affirmed dismissal of Arar's Torture Victim Protection Act ("TVPA") claim, thus leaving *Bivens* as the only available remedy. Amici do not address the TVPA issue.

inconsistent with the Founders' distrust of Congress's capacity and willingness to protect constitutional rights, and their expectation that the judiciary must act as a bulwark against legislative encroachments on these rights. *See* The Federalist No. 78 (Alexander Hamilton), Nos. 10, 48 (James Madison).

Second, certiorari is needed to reject the Second Circuit's reasoning that national security and foreign policy considerations can be invoked as "special factors" to deny relief for violations of constitutional rights. This Court has held repeatedly that courts should exercise their jurisdiction to protect constitutional rights even in the face of national security and foreign policy concerns, or in times of war. As this Court has emphasized, national security and foreign policy cannot be conducted in disregard of constitutional limits. This Court also has rejected arguments, like that adopted by the Second Circuit, that because litigation raises concerns over disclosure of sensitive national security or foreign policy information, the judiciary should abdicate its duty to enforce the Constitution. As this Court has stressed, federal district courts have the competence and tools to protect against such disclosures.

Finally, based on Amici's concerns for the continued efficacy of the *Bivens* remedy as an integral element of the judicial role, we wish to underscore the point made by Petitioner that certiorari is necessary because the Second Circuit departed significantly from the approach outlined in *Wilkie* v. *Robbins*, 551 U.S. 537 (2007), which requires courts to adopt a common law approach and consider all competing factors for and against fashioning a *Bivens* remedy in any particular case. Here, the Second Circuit crafted an

entirely new standard that took no account of any countervailing factors supporting a *Bivens* remedy. *Arar* v. *Ashcroft*, 585 F.3d 559, 573-74 (2009). At stake here is not merely whether a lower court's error will be corrected. Instead, as the circumstances of this case show, the Second Circuit's approach threatens to deprive the *Bivens* remedy of its most central purpose, as articulated by Justice Harlan: A *Bivens* remedy should be available, he said, where it is "damages or nothing" and "at the very least . . . for the most flagrant and patently unjustified sort of police conduct" because "it is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances." *Bivens*, 403 U.S. at 411 (concurring opinion).

ARGUMENT

I. CERTIORARI IS WARRANTED BECAUSE THE SECOND CIRCUIT'S DECISION UNDERMINES THE JUDICIARY'S ROLE TO ACT AS A CHECK ON CONSTITUTIONAL VIOLATIONS BY THE POLITICAL BRANCHES AND TO FASHION REMEDIES FOR SUCH VIOLATIONS WHERE NO ALTERNATIVE REMEDY IS AVAILABLE

The Second Circuit refused to consider that its denial of a *Bivens* remedy would leave Arar without any remedy for his allegations of the most flagrant violations of his constitutional rights. Instead, it concluded that "it is . . . for the elected members of Congress—and not for us as judges" to decide whether a damages remedy is available for constitutional violations that implicate national security or foreign

policy. *Arar*, 585 F.3d at 565. This deferential vision of the judiciary's role is inconsistent with the role assigned to the judiciary in our system of separation of powers as a check on unconstitutional action by either of the other branches of government. That role requires the judiciary to ensure that there is at least some remedy available for constitutional violations.

As James Madison explained in presenting the Bill of Rights to Congress:

> If [these rights] are incorporated into the Constitution, independent tribunals of justice . . . will be an impenetrable bulwark against every assumption of power in the Legislative or Executive . . . .

1 *Annals of Cong.* 439 (Joseph Gales ed., 1834). *See also Davis* v. *Passman*, 442 U.S. 228, 241 (1979) ("[The Constitution] speaks . . . with a majestic simplicity. One of its important objects is the designation of rights. And . . . the judiciary is clearly discernible as the primary means through which these rights may be enforced.").

In order to carry out its obligation to enforce constitutional rights against congressional or executive abuses, the judiciary must have the power to devise effective remedies. This principle was eloquently enunciated early in our Nation's history by Chief Justice Marshall in *Marbury* v. *Madison*:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first

> duties of government is to afford that protection.
>
> . . . .
>
> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

5 U.S. (1 Cranch) 137, 163 (1803).

Accordingly, the Court has repeatedly affirmed the federal courts' authority to craft remedies adequate to redress violations of individual rights. As stated by the Court in *Franklin* v. *Gwinnett County Public Schools,* 503 U.S. 60, 66 (1992), "[f]rom the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court . . . ." *See also Kendall* v. *United States ex rel. Stokes,* 37 U.S. (12 Pet.) 524, 624 (1838) (Noting the "monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist.").

The *Bivens* damage remedy rests on the important need for the judiciary to exercise its authority to craft remedies for violations of constitutional rights. As Justice Harlan explained in his *Bivens* concurrence, "the judiciary has a particular responsibility to assure the vindication of constitutional interests"—a responsibility that becomes especially pressing whenever alternative remedies are

foreclosed and it is therefore "damages or nothing." 403 U.S. at 407, 410.

The principle articulated by Justice Harlan, that *Bivens* damages are particularly appropriate in the absence of alternative remedies for constitutional violations, has continued to inform this Court's decisions since *Bivens*. *See, e.g.*, *Davis*, 442 U.S. at 242 (holding that "litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights"); *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67 (2001) (explaining that a *Bivens* remedy was allowed in *Davis* "chiefly because the plaintiff lacked any other remedy for the alleged constitutional deprivation"); *Carlson* v. *Green*, 446 U.S. 14, 18-23 (holding that *Bivens* remedy was available in the absence of equally effective alternative remedies). Indeed, even when this Court has denied a *Bivens* remedy, the existence of alternative remedies has played a significant role in its decisions. *See, e.g.*, *Wilkie*, 551 U.S. at 550-54 (noting that, unlike claimants in *Davis* and *Carlson*, claimant had alternative, albeit imperfect, remedies); *Malesko*, 534 U.S. at 72 (noting that "alternative remedies [were] at least as great, and in many respects greater, than anything that could be had under *Bivens*").[3]

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[3] There is only one exception, which is not relevant here. A *Bivens* damages remedy is unavailable to military personnel suing on service-related claims. *See United States* v. *Stanley*, 483 U.S. 669 (1987); *Chappell* v. *Wallace*, 462 U.S. 296 (1983). This exception is based on the Constitution's provision

In light of these precedents, a *Bivens* remedy would be particularly appropriate here: not only is Arar currently without any alternative remedy, but he alleges that federal officials deceived his lawyers and hastily transferred him to Syria to prevent him from availing himself of the congressionally created remedy that might have prevented his transfer.[4] The Second Circuit nevertheless ignored these circumstances and, in defiance of this Court's *Bivens* jurisprudence, refused to even consider the absence of any alternative remedy for Arar's claims. Instead, it held that, absent explicit authorization from Congress for a damages remedy, the judiciary must stay its hand because "it is . . . for the elected members of Congress—and not for us as judges—to decide whether an individual may seek compensation from government officers and employees . . . for a constitutional violation." *Arar*, 585 F.3d at 565.

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conferring on Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces", U.S. Const. art. I, § 8, cl. 14, and Congress's exercise of this authority to "establis[h] a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure" and the need for "a special and exclusive system of military justice." *Stanley*, 483 U.S. at 679 (alteration in original) (quoting *Chappell*, 462 U.S. at 302, 300).

[4] *See* Pet'r's Br. 11-15, 19 (describing the statutory scheme for judicial review of removal orders and noting "the important deterrent function that *Bivens* can play where, as here, federal officials have obstructed an individual's access to an alternative remedy")

This conclusion runs counter to this Court's jurisprudence, which has long affirmed the courts' authority and competence to consider and remedy constitutional wrongs even in the absence of express congressional authorization. *See, e.g.*, *Bush* v. *Lucas*, 462 U.S. 367, 374 (1983) (noting that "[t]he federal courts' power to grant relief not expressly authorized by Congress is firmly established" and "provides not only the authority to decide whether a cause of action is stated by a plaintiff's claim that he has been injured by a violation of the Constitution, but also the authority to choose among available judicial remedies in order to vindicate constitutional rights") (citing *Bell* v. *Hood*, 327 U.S. 678, 684 (1946)); *see also Davis*, 442 U.S. at 242 (in the absence of any "textually demonstrable constitutional commitment of [an] issue to a coordinate political department" the judiciary has the authority to remedy constitutional violations). As we discuss in the next section, the fact that such violations may implicate matters of national security or foreign policy has never altered this Court's view. *See infra* 12-22.

Moreover, the Founders would have been astounded by the Second Circuit's assertion that it is "for the elected members of Congress—and not for us as judges" to decide whether a damages remedy should be available for constitutional violations. *Arar*, 585 F.3d at 565. The Founders greatly feared the tendency of the legislature to submit to pressures from the popular majority to exceed constitutional limits and oppress minorities. *See* The Federalist Nos. 10, 48 (James Madison). For that reason, they placed the responsibility on the judiciary to act as a "bulwark" against legislative encroachments on constitutional rights. Thus, the Founders explained:

> [T]he courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments . . . .
>
> Th[e] independence of the judges is . . . requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which . . . have a tendency . . . to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

The Federalist No. 78, at 438 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

The notion that it should be left to Congress to decide whether to vindicate the fundamental constitutional rights of someone as vulnerable to the "ill humors" of these times as Arar is starkly inconsistent with the Founders' intent and our constitutional traditions.

Finally, this Court has repeatedly held that, absent a clear statement by Congress, courts should avoid construing federal legislation to deny any remedy for a constitutional violation because to do so would raise a "serious constitutional question." *Webster* v. *Doe*, 486 U.S. 592, 603 (1988) (citing *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986); *Weinberger* v. *Salfi*, 422 U.S. 749, 762 (1975)); *see also INS* v. *St. Cyr*, 533 U.S. 289, 314 (2001).[5] Surely, equally serious constitutional

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[5] *See also* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2063 (2007) (Arguing that the Constitution requires that "some court must always be open to

questions would be raised if, as the Second Circuit did here, courts denied a judicial remedy based on Congress's silence.

II. CERTIORARI IS NEEDED BECAUSE THE SECOND CIRCUIT'S HOLDING THAT NATIONAL SECURITY AND FOREIGN POLICY CONCERNS CAN BE INVOKED TO DENY ANY RELIEF FOR THE MOST FLAGRANT CONSTITUTIONAL VIOLATIONS CONFLICTS WITH THIS COURT'S JURISPRUDENCE

The Second Circuit erroneously concluded that national security and foreign policy considerations were special factors counseling against a *Bivens* remedy. *Arar*, 585 F.3d at 572-81. Its reasoning directly conflicts with this Court's jurisprudence.

Since the founding of our Nation, this Court has consistently provided remedies for constitutional violations in national security and foreign policy contexts, even in times of war. In fact, this Court has repeatedly rejected the position—adopted by the Second Circuit in this case—that the mere possibility that a claim may involve courts in sensitive national security or foreign policy matters is sufficient to

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hear an individual's claim to possess a constitutional right to judicial redress of a constitutional violation.") (citing Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 345-57 (5th ed. 2003); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1372 (1953)).

deprive federal courts of their power to remedy constitutional violations. Further, the Court has made it clear that the judiciary should not defer to national security or foreign policy actions by the political branches carried on in violation of the Constitution. Instead, this Court has emphasized that the federal courts are competent to navigate these sensitive matters while preserving both the ability of individuals to vindicate constitutional rights and the confidentiality of sensitive information.

A. The Judiciary Enforces the Constitution Against Executive and Legislative Abuses Notwithstanding Claims that National Security and Foreign Affairs Are Implicated

There is a long tradition, stretching from our Republic's earliest days to the Court's recent terms, of federal courts reviewing the constitutionality or legality of executive and legislative conduct in emergencies and in the domain of national security and foreign affairs. The Second Circuit's decision sharply breaks from this tradition.

In the decades immediately after the Founding, federal courts grappled repeatedly with the legality of executive action in wartime. During the "Quasi-War" with France, the Court affirmed a damages remedy against the captain of the U.S. Frigate *Boston* for the unlawful seizure of a Danish ship. *Little* v. *Barreme*, 6 U.S. (2 Cranch) 170, 176-79 (1804). Chief Justice Marshall held that seizure based on Presidential direction was illegal because it contradicted the terms of military action Congress had authorized. *Id.*; *see also Talbot* v. *Seeman*, 5 U.S. (1 Cranch) 1 (1801) (adjudicating a challenge to a U.S. warship's capture of

a foreign vessel during the Quasi-War). The War of 1812 brought before the Court more civil damages actions challenging wartime executive action. In *Brown* v. *United States*, 12 U.S. (8 Cranch) 110 (1814), the Court held unlawful a seizure of 550 tons of timber belonging to British subjects. *See also The Julia*, 12 U.S. (8 Cranch.) 181 (1814) (holding that a seizure of American citizens' property sailing under an enemy flag in the War of 1812 was licit under prize law).

During the Civil War, federal courts had to grapple with the legality of executive action in the midst of the most serious and sustained military conflict to occur on American soil. The most significant of those cases reflects the principles that have guided courts even in times of national crises. In *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), a U.S. citizen successfully challenged his conviction before a military tribunal. The Court rejected the argument that "[a]fter war is originated . . . the whole power of conducting it . . . is given to the President . . . [who] is the sole judge of the exigencies, necessities, and duties of the occasion, their extent and duration." *Id.* at 18 (citations omitted). Instead, the Court emphasized the importance of the judiciary's role in protecting constitutional rights even in wartime:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. *No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great*

> *exigencies of government.* Such a doctrine leads directly to anarchy or despotism . . . .

Id. at 120-21 (emphasis added).

Subsequent wars furnished no cause to derogate from *Milligan's* wisdom. In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), despite the government's dire warnings about the repercussions of a steel strike on military and foreign policy during the Korean War, the Court enjoined the President's seizure of steel mills as beyond his constitutional powers. *Id.* at 587-89; *see also Duncan* v. *Kahanamoku*, 327 U.S. 304, 324 (1946) (reading statute declaring martial law narrowly in order to preserve rights).

The Court's recent cases involving detainees designated as "enemy combatants" confirm the federal courts' undiminished role in checking unconstitutional executive and legislative action even when confronting war or grave threats to national security.

In *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), the Court rejected arguments that the prosecution of war justified the denial of basic due process to an American citizen captured on an Afghan battlefield. Despite the President's designation of Yaser Hamdi as an "enemy combatant," the Court held that he was entitled to procedural due process rights when challenging that designation. *Id.* at 533, 539 (plurality op.). Rejecting claims that national security considerations required the Court to defer to the President's decision to detain Hamdi, the Court explained:

> [T]he position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the

> broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government.

Id. at 535-36; *see also United States* v. *Robel*, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.").

In *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006), the Court reviewed a challenge to the President's power to convene military tribunals to try "enemy combatants." *Id.* at 567. The Court found that the President lacked inherent power to establish commissions that violated the laws of war and the Uniform Code of Military Justice, despite the danger that the petitioner and other terrorism suspects potentially posed to the United States:

> We have assumed, as we must, that the allegations made in the Government's charge against Hamdan are true. We have assumed, moreover, the truth of the message implicit in that charge—viz., that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity. . . . But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the rule of law that prevails in this jurisdiction.

Id. at 635.

More recently, the Court struck down under the Suspension Clause legislation limiting the federal courts' jurisdiction to entertain habeas corpus petitions from Guantánamo detainees. *See Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008). Rejecting arguments that recognizing and enforcing such constitutional rights would undermine national security during a time when our Nation faces grave terrorist threats, Justice Kennedy's majority opinion stated in terms equally applicable to the allegations of torture at stake here:

> The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.

Id. at 2277.

As these cases show, even grave threats to the Nation do not serve to eliminate the judiciary's role in policing the legality of the means through which those threats are addressed.

B. Judicial Deference on Matters of National Security and Foreign Policy Does Not Extend to Torture or Other Constitutional Violations

The Second Circuit's assertion that courts should defer to the political branches because national security and foreign policy matters are implicated rests on a mischaracterization of Petitioner's claims that entirely overlooks the fundamental constitutional

violations on which they are focused and on a misreading of this Court's decisions.

The Second Circuit stated that Arar's lawsuit was a challenge to the government's foreign policy of "extraordinary rendition." *Arar,* 585 F.3d at 563, 572. Based on that premise, it maintained that the judiciary must defer to the political branches in this case because Arar's claim challenged a foreign policy of the U.S. government. But Arar does not challenge "extraordinary rendition" as a national security or foreign policy tool; he instead seeks a remedy from the courts for the actions of federal officials who conspired to send him to Syria allegedly with the knowledge and expectation that he would be tortured. Such conduct cannot be part of any national security or foreign policy because it is forbidden by the Constitution,[6] federal statutes,[7] and treaty obligations.[8] In fact the U.S.

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[6] *See, e.g., Rochin* v *California*, 342 U.S. 165, 168-74 (1952); *Ashcraft* v. *Tennessee*, 322 U.S. 143, 155 (1944); *Palko* v *Connecticut*, 302 U.S. 319, 325-26 (1937) (finding that "protection against torture, physical or mental" is among the absolute minimum "fundamental" rights that comprise "the very essence of a scheme of ordered liberty"), *overruled on other grounds, Benton* v. *Maryland*, 395 U.S. 784 (1969) (prohibition against double jeopardy also among fundamental rights); *Brown* v *Mississippi*, 297 U.S. 278, 285-86 (1936)

[7] *See* 18 U.S.C. §§ 2340-2340A; Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified as a note to 28 U.S.C. § 1350); Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (codified as a note to 8 U.S.C. § 1231).

[8] *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85.

government officially maintains to the United Nations that it "does not permit, tolerate, or condone torture . . . by its personnel or employees under any circumstances."[9]

Additionally, the Second Circuit misread this Court's precedents. None of the cases cited by the Second Circuit supports the proposition that federal courts should defer to the political branches in cases where there are claims of constitutional violations because national security and foreign affairs are implicated.

The Second Circuit cites, for example, *United States* v. *Curtiss-Wright Exp. Co.*, 299 U.S. 304, 320 (1936), for the proposition that the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations" precludes judicial involvement in foreign affairs matters. *Arar*, 585 F.3d at 575. The Second Circuit overlooked, however, the rest of the quoted sentence, which states that this "power . . . of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." 299 U.S. at 320.

The Second Circuit's reliance on other decisions of this Court is equally misplaced. In none of those cases did this Court decline to review a constitutional claim. For example, the Second Circuit cites

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[9] *See* Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America, at 4, U.N. Doc. CAT/C/48/Add.3 (May 6, 2005), *available at* http://www.state.gov/documents/organization/62175.pdf.

Department of the Navy v. *Egan*, 484 U.S. 518, 530 (1988), as support for the judiciary's reluctance to "intrude upon the authority of the Executive in military and national security affairs." *Arar*, 585 F.3d at 575. But *Egan* did not raise constitutional claims; rather, the Court declined to review a security clearance denial, holding that "no one has a 'right' to a security clearance." 484 U.S. at 528.

By contrast, shortly thereafter in *Webster* v. *Doe*, the Court refused to read a federal statute giving the CIA's Director discretion over the Agency's employment affairs to bar review of a claim of wrongful discharge predicated on the First Amendment. Notwithstanding the government's claims that the suit would intrude into the CIA's "affairs to the detriment of national security," 486 U.S. at 604, the Court concluded that reading the statute to bar constitutional claims would raise serious constitutional issues. *Id.* at 603-05. Similarly, the Second Circuit cited *Lincoln* v. *Vigil*, 508 U.S. 182 (1993), in which this Court denied review of the plaintiff's statutory claims but, citing *Webster*, refused to deny review of constitutional claims, instead remanding them for further development.

The Second Circuit also miscited *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), as holding that "foreign policy considerations" constituted special factors foreclosing a *Bivens* remedy. *Arar*, 585 F.3d at 573. *Verdugo-Urquidez* did not involve a *Bivens* claim. Instead, the case addressed a motion to suppress evidence and held that the Fourth Amendment's requirement of a search warrant did not have extraterritorial application. The Court only touched on *Bivens* when it hypothesized that adopting the

dissenting opinion would make such actions available to aliens against U.S. officials acting extraterritorially—with the speculative caveat that "[p]erhaps a *Bivens* action might be unavailable in some or all of these situations due to 'special factors counselling hesitation.'" *Verdugo-Urquidez*, 494 U.S. at 274.

In *Munaf* v. *Geren*, 128 S. Ct. 2207 (2008), cited by the Second Circuit, *Arar*, 585 F.3d at 575, the Court refused to enjoin the transfer of Americans voluntarily present in Iraq to Iraqi authorities for prosecution for allegedly violating Iraqi law, notwithstanding their claim that the Iraqis would torture them. Justice Souter underscored that the Court's decision expressly allowed for the possibility of a different result had the petitioners made a showing that theirs was an "extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway." *Munaf*, 128 S. Ct. at 2228 (Souter, J., concurring); *see also id.* at 2226 (majority opinion).

C. Speculative Concerns that Litigation May Involve Classified Information Do Not Justify Abdicating the Federal Courts' Duty to Protect Constitutional Rights

The Second Circuit also raised the concern that the federal courts lack the "institutional competence" to hear *Bivens* claims such as Arar's, because any litigation would "enmesh the courts ineluctably" in inappropriately reviewing intelligence matters and diplomatic relations that would involve "classified information." *Arar*, 585 F.3d at 574-81. As noted above, *supra* 18, these concerns were exaggerated by

the Second Circuit's mischaracterization of Arar's claim as a challenge to "extraordinary rendition," rather than a more focused claim regarding federal officials' complicity in torture. In any event, such speculative fears are not special factors justifying rejection of the *Bivens* claim, as this Court has recently rejected similar government arguments that such fears are reasons for denying review of constitutional claims.

Thus, in *Boumediene*, this Court explicitly rejected the government's argument that its "interest in protecting sources and methods of intelligence gathering" justified denying judicial intervention. Instead, Justice Kennedy relied upon "the expertise and competence of the District Court . . . in the first instance" to protect against such disclosures. 128 S. Ct. at 2276. Similarly, in *Webster*, the Court rejected the government's argument that judicial review of constitutional claims was precluded because it would create a risk that confidential materials might be disclosed to the detriment of national security. Instead, Chief Justice Rehnquist stated that any such concerns were manageable, as "the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." 486 U.S. at 604.[10]

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[10] It is also notable that neither the district court nor the Second Circuit addressed the government's state secrets privilege claim and the Second Circuit majority did not take up the government's suggestion at oral argument that it should

III. CERTIORARI IS WARRANTED BECAUSE THE SECOND CIRCUIT'S DEPARTURE FROM THIS COURT'S *BIVENS* JURISPRUDENCE THREATENS TO UNDERMINE RESPECT FOR THE JUDICIAL SYSTEM AND THE RULE OF LAW

The Petition and the Second Circuit dissents already describe the Second Circuit's radical departure from this Court's direction in *Wilkie* that, in considering the appropriateness of a *Bivens* remedy, federal courts must act as common law courts considering all the relevant factors for and against such a remedy.[11] As retired federal judges, Amici wish to underscore the impact that the mistaken analysis adopted by the Second Circuit would have on the judicial system and the rule of law.

The Second Circuit held that in deciding whether to apply a *Bivens* remedy, "we do not take account of countervailing factors" favoring a judicial remedy. *Arar*, 585 F.3d at 573-74, 574 n.7. It also asserted that "the only relevant threshold—that a factor 'counsels hesitation'—is remarkably low" and bars a *Bivens* remedy "whenever thoughtful discretion would even pause to consider." *Id.* at 574. Together, these two principles, if accepted, will likely eviscerate

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remand the case to address that privilege. *See Arar*, 585 F.3d at 638, n.15 (Calabresi, J., dissenting).

[11] *See* Pet'r's Br. at 16-20; *Arar*, 585 F.3d at 600-01 (Sack, J., dissenting); *id.* at 620-22 (Parker, J., dissenting); *id.* at 623-27 (Pooler, J., dissenting).

the courts' ability to award a *Bivens* remedy, even in the face of the most flagrant violation of constitutional rights.

In this case, the Second Circuit's principles meant that the court ignored such factors as the impact of leaving unremedied shocking allegations of constitutional violations, the perverse incentives this result might provide to federal officials, and the message the decision sends about our Nation's commitment to our constitutional values and our treaty obligations to renounce torture under all circumstances. Meanwhile, the Second Circuit's holding that the availability of a remedy for such a constitutional violation should be wholly dependent on the will of popular majorities as reflected in Congress will be viewed with cynicism. Amici fear this decision will breed disrespect for our judicial system and its commitment to the rule of law.

Amici urge this Court to grant review and assure that the *Bivens* remedy continues to be available for flagrant constitutional violations such as those alleged here. Like Justice Harlan, we submit that "it is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances." *Bivens*, 403 U.S. at 411.

CONCLUSION

For the reasons set forth above, Amici respectfully urge the Court to grant the petition for certiorari.

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Respectfully submitted,

Sidney S. Rosdeitcher
Counsel of Record
Aaron S. Delaney
Brian A. Kohn
Eric S. Tam
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

Elizabeth Goitein
Emily Berman
THE BRENNAN CENTER FOR
JUSTICE AT NYU SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, NY 10013

Aziz Z. Huq
1111 East 60th St.
Chicago, IL 60637
(773) 702-9566
Attorneys for Amici Curiae
Retired Federal Judges